

ORIGINAL
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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF YAVAPAI

AUG 11 2010 ✓

JEANNE HICKS, Clerk
~~CY. Chamberlain~~
Deputy

THE STATE OF ARIZONA,)
)
Plaintiff,)
)
vs.) No. P1300CR2008-1339
)
STEVEN CARROLL DEMOCKER,)
)
Defendant.)
_____)

BEFORE: THE HONORABLE WARREN R. DARROW
JUDGE PRO TEMPORE OF THE SUPERIOR COURT
DIVISION SIX
YAVAPAI COUNTY, ARIZONA

PRESCOTT, ARIZONA
FRIDAY, JULY 23, 2010
3:46 P.M. - 4:34 P.M.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

JURY TRIAL

TESTIMONY OF THERESA KENNEDY

ROXANNE E. TARN, CR
Certified Court Reporter
Certificate No. 50808

INDEX

PROCEEDINGS

PAGE

TESTIMONY

PAGE

THERESA KENNEDY

Direct examination resumed by Mr. Butner
Voir dire examination by Mr. Sears
Direct examination resumed by Mr. Butner
Voir dire examination by Mr. Sears

4
7
15
24

APPEARANCES

On Behalf of the State:

Mr. Joseph Butner and Mr. Jeffrey Paupore
Yavapai County Attorney's Office

On Behalf of the Defendant:

Mr. John Sears
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Mr. Larry Hammond and Ms. Anne Chapman
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Phoenix, AZ 85012

(Whereupon, the jury enters the courtroom.)

THE COURT: The record will reflect the presence of the defendant, counsel and the jury. The witness, Detective Kennedy, is back on the witness stand.

And Detective Kennedy, you do understand you are still under oath?

THE WITNESS: Yes.

THE COURT: Mr. Butner.

MR. BUTNER: Thank you judge.

THERESA KENNEDY,
previously called as a witness, having been duly sworn,
testified further as follows:

DIRECT EXAMINATION RESUMED

BY MR. BUTNER:

Q. Let's go back to Exhibit No. 2520 now.

Take a look at that, again. Detective Kennedy, what way-point was that particular photograph taken at?

A. At Way-point 6 and at Way-point 30.

Q. And so you took the photograph actually when you were at Way-point 6?

A. Correct.

Q. And you hadn't gotten to Way-point 30, yet; is that correct?

A. Correct.

Q. Were you following the three-Z footprints at that point in time?

A. Yes.

Q. Looking at Exhibit 2520, can you see the three-Z footprint in that particular photograph?

A. Yes.

Q. Is the entire footprint there?

A. No.

Q. Is there something that is obstructing the view of the three-Z footprint?

MR. SEARS: 2520 is not in evidence. It is improper for the witness to be testifying from it.

THE COURT: Sustained.

BY MR. BUTNER:

Q. Can you see the entire -- in that particular photograph, when you took the photograph, was the entire three-Z footprint visible for your picture?

A. No.

Q. But you could see part of the three-Z's?

A. Yes.

Q. Was this in a progression as you were following footprints of the three-Z's?

MR. SEARS: Leading.

THE COURT: Sustained.

MR. BUTNER: Okay.

Q. Tell us how you arrived at Way-point 6?

A. I followed Track 1 from Way-point 1 along the trail that we described earlier, 2, 3, 4, 5, and then I continued where I made it to Way-point 6.

Q. You had just been at Way-point 5 and taken a photograph?

A. Yes.

Q. Were there footprints between Way-point 5 and Way-point 6?

A. Yes.

Q. The same three-Z footprints?

A. Yes.

Q. Do you remember how many there were?

A. No.

Q. But were you continuing to follow those?

A. Yes.

Q. What was it that caused you to take the photograph at Way-point 6?

A. The photograph at Way-point 6 was taken because I ran into another shoe impression that was not similar to the shoe impression I was following.

MR. SEARS: The witness is testifying from an exhibit that is not in evidence. I move to strike that answer.

THE COURT: Overruled.

MR. BUTNER: I move for admission of 2520.

MR. SEARS: Voir dire, Your Honor?

THE COURT: All right.

VOIR DIRE EXAMINATION

BY MR. SEARS:

Q. Detective, looking at 2520, there is a small portion of an impression from the shoe that you described as the shoe that makes Track 1; is that right?

A. Yes.

Q. The three-Z characteristic is nowhere visible in that portion of the visible shoeprint impression on 2520; is that right?

A. I can see it.

Q. There is another shoeprint impression in this picture that occupies much of the frame; correct?

A. Correct, but there are two shoeprints in that photo.

Q. That's correct. Now, you were subsequently tracking another set of impressions that you called Track 2; correct?

A. Yes.

Q. Do you have with you today any other photograph that you took of an impression in Track 2 that shares a common characteristic with the impression in 2520 for identification?

MR. BUTNER: Objection. Vague.

THE COURT: Overruled.

THE WITNESS: Please say that again.

MR. SEARS: May it be read, Your Honor?

THE COURT: Roxanne, can you do that?

THE COURT REPORTER: Sure.

(Whereupon, the relevant record was read back.)

MR. BUTNER: Judge, could I be heard on that?

THE COURT: Okay.

MR. BUTNER: It is not specific to which shoeprint he is talking about.

THE COURT: Mr. Sears, do you want to rephrase that.

BY MR. SEARS:

Q. There is a series of impressions that you describe as Track 2; correct?

A. Yes.

Q. You believe they are made by the same shoe; correct?

A. Yes.

Q. You took pictures of impressions of shoes in Track 2; correct?

A. Shoes in Track 2 or of Track 2?

Q. Of Track 2.

A. Yes.

Q. Do you have them with you today?

A. I brought photos that I took with me today, yes.

Q. Would you look at them, please, and see if there is a photograph of a shoeprint impression in Track 2 that has a common characteristic visible to the lay person, like you, consistent with some characteristic of the impression in 2520 for identification.

A. I am not understanding the question.

THE COURT: I do. Mr. Butner?

MR. BUTNER: I don't think that is proper voir dire. We have other exhibits that we will present, and apparently, Mr. Sears wants us to get into that right now with these other exhibits. That is not appropriate at this point in time. That is not proper voir dire.

THE COURT: I think I understand the question, Detective.

Mr. Sears, state your question.

MR. SEARS: Your Honor, the question is:

Q. Do you have another photograph with you here today, Detective, that you took of shoeprint impressions in Track 2 that has an identifiable characteristic that all of us in the courtroom can see as non-experts that is visible in 2520?

A. The way I am understanding your question is you are asking about other photos of Track 2?

Q. Correct.

A. Yes, I have photos.

Q. My question is: In any of those photos, is there a visible characteristic? Do you understand what I mean by "characteristic"?

A. Yes.

Q. Like the three-Z's, for example, that you saw in Track 1.

A. Yes.

Q. Some characteristic that all of us in the courtroom could understand that is visible in those other photos, and also visible in the impression depicted in 2520 for identification.

A. I would have to look at my photos.

Q. Please do.

MR. BUTNER: Judge, I have her photos marked for evidentiary purposes.

THE COURT: You are objecting to that particular question now?

MR. BUTNER: Yes.

THE COURT: Sustained.

Any further voir dire?

MR. SEARS: Yes, Your Honor.

The purpose of the foundation for this is consistent with the prior rulings of the Court. If you want

to go to side bar, we can discuss these, Your Honor.

There has to be -- for her to testify as a non-expert, there has to be some foundation for observing some characteristic in the impression that she calls Track 2 from photograph to photograph. I am asking her to look at other photographs to see if there is such a characteristic that would provide foundation for 2520. She said 2520 is part of Track 2. It has to be connected somehow to Track 2.

THE COURT: That is part of the general foundation objection. Do you have the specific prior ruling? Do you have that language? I will have a side bar if you have that, if you are referring to something specific that was a previous ruling in this case by the previous judge, and we will have a side bar.

Ladies and gentlemen, please feel free to stand and stretch.

(Whereupon, the following was held at
Side bar out of the presence of the jury.)

THE COURT: We have counsel, and we are on the record for this.

One thing, you have to have the mic or this doesn't work.

MR. SEARS: Your Honor, I am looking at Page 90 of the summary. It is the ruling that we talked about in chambers. Below the yellow, if she says something is similar

to one or the other, this is why she had the "Z" pattern in the shoe. That is the observation. I think that is permissible. I don't think she needs to be an expert to testify to that.

If I could show you, Your Honor, this is 2520 for identification. The remainder of the photos that she took -- this is the same graph with the scale. You can see it is the same photograph. The remainder of the photograph with Track 2 shoes show no common characteristics like the three-Z on the Track 1 shoes that would allow her to testify as to 2520, that it is a shoe from Track 2, as to this witness.

This shoeprint here that has some observable characteristics, there is no other photograph that she took that we have been shown in disclosure that has a visible characteristic similar, by the way, to the observable three-Z in this photograph of the Track 1 shoe.

THE COURT: And I think that is getting into a different question of whether or not she can say it goes over and matches the shoe on characteristics. This has to do with tracking, and I am looking for if it exhibits that or not. I don't know whether she has the ability to say how she can follow a track.

That is all I am looking for in terms of this witness. I believe that is the only thing that is

relevant to the foundation for this.

MR. BUTNER: That is what I was going to point out, Judge. We discussed the same thing in chambers.

She will testify about the three Z's. She will not testify about some sort of other characteristics to the other shoe, other knowledge, the fact that the shoeprints match each other. When she began tracking that shoeprint, that was at a different time. Right now we are laying the foundation for the three-Z footprint, and the fact she was following that out and noting the three-Z characteristics.

THE COURT: If there is another footprint now, or shoeprint that you are asking to come in, and I thought you were talking about Track 2, and I haven't heard the foundation for why the other track is something a tracker, not necessarily an expert in shoeprints, but a tracker is able to determine a distinct track.

MR. BUTNER: The only point we are at right now is continuing to follow the three-Z's, and then another track becomes superimposed on top of the three-Z footprint. She does not follow that track at this time. She is continuing to follow the three-Z track. She will follow that at a later point in time in a different way.

MR. SEARS: They want to admit a photograph of the shoe in 2520 saying it is Track 2 without laying the

foundation for what Track 2 is. This is what we tried to point out in chambers, which is one thing I can say. You can follow the three-Z's. Judge Lindberg understands that. You understood that wide range to say it is Track 2. They are jumping ahead and saying this shoeprint that overlaps this partial shoeprint, this partial print, but that this shoeprint is somehow connected to Track 2. They jumped ahead and said now, taking this out of sequence and admitting it now, without the other foundation, gives the jury that this is a recognizable and provable impression from something called Track 2.

THE COURT: I do believe that the testimony, as Mr. Butner anticipates, is this is the three-Z print.

MR. BUTNER: The three-Z print is up at the top, Judge. This is the other shoeprint that came on top of it, and she will testify that she was following that print right here, and lo and behold, this other print came on top of it. She testified -- she indicated when she was on the witness stand that she would explain that later when we talked about Track 2, and that is what I asked her about.

THE COURT: The only thing for foundation at this point, and I can't rule that it is admissible as Track 2, is whether or not there is foundation that there are two distinct tracks there sufficiently for a tracker. And I haven't heard that foundation, I don't believe.

MR. BUTNER: I will ask further questions to clarify that.

THE COURT: I don't know what you are going to do at this point.

The foundation objection is sustained.

MR. SEARS: Thank you, Your Honor.

(Whereupon, the following was held in open court in front of the jury.)

THE COURT: Thank you, ladies and gentlemen.

Mr. Sears had asked some voir dire.

Mr. Butner.

MR. BUTNER: Thank you, Judge.

DIRECT EXAMINATION RESUMED

BY MR. BUTNER:

Q. Looking at Exhibit 2520; right? You have it right in front of you; correct?

A. Yes, uh-huh.

Q. What portion of that particular photograph -- withdraw that. Is there a portion of the three-Z footprint depicted in the photograph?

MR. SEARS: Asked and answered.

THE COURT: Overruled.

THE WITNESS: Yes.

BY MR. BUTNER:

Q. Would you describe what portion of the three-Z

footprint is depicted.

MR. SEARS: Testifying from something not in evidence, Your Honor.

THE COURT: Overruled.

THE WITNESS: The heel portion.

BY MR. BUTNER:

Q. Are the three-Z's visible?

A. Yes.

Q. Did you see the three-Z's, Detective Kennedy?

A. Yes.

Q. Detective Kennedy, look at me, please. Did you see the three-Z's that you were tracking at the location when you took that picture in Exhibit 2520?

A. Yes.

Q. And was there something that obscured the remainder of the footprint from the three-Z footprints?

MR. SEARS: Leading.

THE COURT: Overruled.

THE WITNESS: Yes.

BY MR. BUTNER:

Q. What was that?

A. A different shoeprint.

Q. Is that also depicted in this photograph?

A. Yes.

Q. Is that part of the reason you took the

photograph?

A. Yes.

Q. So that -- was this a -- this three-Z photograph that you took, what Way-point was it at?

A. At Way-point 6.

Q. And did you continue tracking the three-Z footprints from Way-point 6?

A. Yes.

Q. And how many more way-points did you follow out in tracking the three-Z footprints?

A. I hit from Way-point 6, where I had the question that you are asking me. I went all the way out a mile-and-a-half approximately.

Q. How many more way-points were there?

A. I went to Way-point 18.

Q. Still tracking the three-Z's?

A. Yes.

Q. This is at No. 6?

A. From No. 6.

Q. This picture that we are talking about, Exhibit 2520, this is a photograph that you took at Way-point No. 6 of the three-Z's?

A. Yes.

MR. BUTNER: I would move for the admission of this exhibit at this time, Judge, 2520.

THE COURT: Mr. Sears?

MR. SEARS: No foundation for the portion of the exhibit that is not the three-Z shoeprint, Your Honor.

THE COURT: Overruled.

2520 is admitted with regard to the testimony regarding Track 1.

BY MR. BUTNER:

Q. We had a little -- back up for just a second, because we had a good picture, I believe, of Exhibit No. 2519.

Would you point to the portion of Exhibit 2519 that constitutes the three-Z's that you were tracking?

A. Yes. You have the laser pointer.

Q. I don't have it. Yes, I do.

A. It is right here.

Q. That is a good way to do it. Those three-Z's right there.

A. Yes.

Q. Did you also track those in Exhibit No. 2520?

A. Yes.

Q. Can you point on this photograph to where the three-Z's are depicted?

A. Can I look at it from there?

Q. I think I might have turned it around.

THE COURT: What number is that?

MR. BUTNER: Exhibit 2520, Judge.

THE WITNESS: If you put it this way, they are right there.

BY MR. BUTNER:

Q. Okay. Would you point to where they are depicted in this photograph.

A. They are right in here.

Q. And then there is some other footprint obscuring the three-Z's footprint?

A. Yes.

Q. Would you kind of outline that for us, please.

A. This is the heel portion going toward the toe, obviously, right there. And it is over the top of this shoeprint here.

Q. Okay. Thank you.

And then in regard to Track No. 2, okay, did you find other footprints someplace else that you began tracking?

A. Yes.

Q. Where did you find those?

A. I found some instances of Track No. 2 behind the house, and also at the Glenshandra trailhead.

Q. And you marked those also with way-points?

A. I marked the two tracks -- yes, I marked Track 2 with way-points, as well.

Q. Okay. So using our better lighting system here, you talked about there were 18 way-points for the three-Z footprints; right?

A. Yes.

Q. And then where did you begin tracking the Track No. 2?

A. Well, as we stated before, I found Track No. 2 up here, and I marked it to come back to follow-up with that later. After I completed following Track 1 and returned to the residence, I was back here in this portion behind the house, and I noticed a shoeprint similar to this shoeprint, which I confirmed on my camera.

MR. SEARS: Objection. Foundation. 701, 702 and 703, Your Honor.

THE COURT: Sustained.

MR. SEARS: Move to strike.

THE COURT: The objection is sustained, and the testimony is stricken, in any event.

BY MR. BUTNER:

Q. Detective Kennedy, on the map here --

A. Yes.

Q. -- what are the indicators for Track 2?

A. The indicators for Track 2, the yellow -- the crosses here, these yellow ones are Track 2, traveling in this direction, towards this location. The red crosses

indicate Track 2, traveling away from that location in this direction here to here.

Q. Okay.

A. These here indicate where Track 2 and the bicycle tracks were located.

Q. And are each of those yellow crosses, are those way-point marks that you used your GPS at?

A. Yes.

Q. And each of those red crosses, are those way-point marks that you used your GPS at?

A. Yes.

Q. And then the blue squares, did you use your GPS marker at those location, also?

A. Yes.

Q. At which GPS number did you begin tracking Track 2?

A. That is difficult to answer, because I began backtracking here, but I was called away from that location and had to start again at a different location.

Q. Okay. Explain to us, first of all, what do you mean when you began backtracking?

A. When I saw these Track 2 shoeprints here, I started marking them with flags, and I saw them going in this direction and this direction. And I marked them with flags. These, obviously, were going towards the house, and these

were going away from the house. And when I got somewhere in here, I was instructed to go up here and begin tracking bicycle tracks. And when I got here on the other side of the metal gate there, I saw Track 2 again, or what was similar to Track 2.

MR. SEARS: Same objection, Your Honor. Move to strike.

THE COURT: Overruled.

BY MR. BUTNER:

Q. What are the way-point marks where you first noticed Track 2 at the Bridle Path residence?

A. They are Way-point No. 73 and Way-point No. 74.

Q. Would you point to those for us, please.

A. This one should be 73, and this one should be 74.

Q. So 73 is the one that is closer to the fence?

A. Correct.

Q. And 74 is just a little bit closer to the house?

A. Correct.

Q. And from 73 and 74, where did you begin tracking from there?

A. From 73. 73 was the one that I saw. 74 was found later.

Q. When was that found?

A. That was found after we started tracking this direction. I, from 73, by myself started going this way.

Q. And which photograph number goes with Way-point 73?

A. I did not take a photo of Way-point 73.

Q. Which way-point of Track 2 did you take a photograph of?

A. I took several. Would you like me to show you?

Q. If you would point out which way-points you took them of.

A. This would have been a photograph at -- my photograph number was, I think, 1478, the one that we just talked about.

Q. That is Exhibit 2520 that has already been admitted; right?

A. Yes.

Q. You took that photograph of Track No. 2?

A. Yes.

Q. Where else did you take a photograph of Track No. 2?

A. I took photographs here.

Q. What photograph number is that?

A. That should be 14 -- my photograph number would be 1480. I don't know what you have it marked as.

Q. Let me show you what has been marked as Exhibit 2522. Your photograph No. 1480; is that correct?

A. Yes.

Q. Do you recognize what is depicted in that exhibit?

A. It is very difficult, but, yes.

Q. What is depicted?

A. Track No. 2.

Q. Where was that photograph taken?

A. Just inside the iron gate at the Glenshandra trailhead, right here.

Q. And did you begin tracking that footprint from that point?

A. Yes.

Q. And where did you track it to?

A. That track went from here into here, and then it continues on these yellow dots this direction -- or yellow crosses, I am sorry, this direction.

MR. BUTNER: Okay. I would move for the admission of Exhibit No. 2522 at this time.

MR. SEARS: Voir dire, Your Honor?

THE COURT: Yes.

VOIR DIRE EXAMINATION

BY MR. SEARS:

Q. Do you have 2520 with you, Detective, photograph 2520?

A. I only have this one.

MR. SEARS: May she be shown 2520, Your Honor?

THE COURT: Yes. Mr. Butner?

MR. BUTNER: I am trying to find it, Judge.

BY MR. SEARS:

Q. Do you have both 2520 and 2522, Detective?

A. Yes.

Q. Tell me what observable physical characteristic that you as a lay person see in 2522 for identification which you also see in 2520 in evidence.

A. Clearly, 2520 is a better defined picture. This was taken more -- this was taken after noon when the sun was higher up in the sky, so it is difficult to see any definition, but you can see the outline of the shoeprint. You can kind of see the "V" inside here.

Q. You are pointing to an observable physical characteristic in 2522?

A. I am trying to.

Q. Yes?

A. Yes.

Q. And you see that same characteristic in 2520, do you?

A. Yes. And again, the photo is not going to be what I -- I mean, my acuity is going to be different than what I can see in this photo.

MR. SEARS: May I approach the witness, Your Honor?

THE COURT: Yes, you may.

MR. SEARS: Thank you.

Q. Detective, would you show me what you are looking at in 2522, please.

MR. BUTNER: If you could, please speak out loud, Detective Kennedy, so that all of us can hear.

THE WITNESS: These right here that look like V's. They are very difficult to see.

BY MR. SEARS:

Q. On 2520.

A. It would be here.

MR. SEARS: Your Honor, I think this is something that is going to require the Court to inspect before this objection can be ruled on.

MR. BUTNER: Judge, this is lay testimony on this. She is not testifying as an expert on footprint impressions, just exactly what counsel wanted.

THE COURT: Ladies and gentlemen, we are going to go ahead and take the weekend recess. I hope I didn't time this with the storm too badly.

Remember the admonition. Follow all aspects of the admonition, any exposure to the media, obviously, not discussing the case among each other until the case is completely over. Please take care, and we are resuming on Tuesday, next Tuesday. Be ready at nine o'clock, and we will get started as soon as we can after that.

Counsel, before I excuse the jury,
anything else you wish to address?

MR. SEARS: Are we taking this up on Tuesday?

THE COURT: I am asking the parties to remain.

MR. SEARS: No, thank you, Your Honor.

MR. BUTNER: Nothing further from the State at
this time.

THE COURT: Thank you.

(Whereupon, the jury exits the courtroom.)

THE COURT: Please be seated.

Record will show that the jury has left
and the attorneys and Mr. DeMocker are present.

And, Counsel, this is not a legal issue
that I thought was still in question after I read the
summaries, and here we are. And this is rather surprising.

I do want to say this, Counsel, I don't
want to be arguing three or four issues at once. When we did
the side bar, it came up about whether or not the particular
print, what has been called the print in Track 1, can be tied
to a shoe that was on Carol Kennedy. That is a different
question, a completely different question, but that is what I
was hearing at side bar.

This is a different matter, and I think
it is really one more prone to legal argument, and again, I
thought this was resolved by Judge Lindberg, and now we are

having this disagreement.

I see, Mr. Butner, you have asked Detective Kennedy to remain here on the stand, as you think that you wanted to make further showing?

MR. BUTNER: Judge, yes. She clearly testified about the V's, which are the characteristics on Track 2, apparently, visible to her, especially in the one photograph where she says it is a photograph that was taken around noon, so the light is not very good and not equivalent to her visible acuity at the time, if you recall. She said that. But she said she could clearly distinguish those "V's." Those are the kinds of characteristics she was following.

She is not testifying as to identity of footprints or anything like that. She is testifying to one track following another, and the track that follows the other has the same kind of physical characteristics. That is all her testimony has been offered for, and I thought this issue was addressed previously and has been ruled upon by this Court.

THE COURT: That was my impression, Mr. Sears.

MR. SEARS: Here's the dilemma, and perhaps it would be appropriate, Your Honor, if you would look at the two exhibits for yourself.

THE COURT: Yes. If I could actually see

them.

Thank you, Detective.

MR. SEARS: Here is where I think we have taken Detective Kennedy clearly over the line beyond her expertise, and are asking for her now to give shoe comparison expert testimony. It is one thing for her to see observable characteristics. Every lay witness in the courtroom, every member of the jury --

THE COURT: Mr. Sears, I am going to stop you right there, because when you are talking about tracking, that is a whole -- there are other circumstances that go into that, other than observing a characteristic.

Go ahead.

MR. SEARS: In this respect, I think it is observable characteristics. It is one thing to say I saw a trail of shoeprints impressions, and I followed that trail and mapped them.

It is another thing to say that each of the impressions was made by the same shoe. That is a very different question, I think. That is not necessarily a part of shoeprint tracking. You can follow shoeprints off into the field, which is what she was doing.

The point is this: What she is trying to do now, and what the State wants her to do, is have her say that the larger shoeprint impression in 2520, which you've

admitted, is also the same shoeprint in 2522 for identification.

We think that the foundation for that requires her to show some observable characteristic in the nature of the three "Z's," something that anybody can see.

The first question I have is whether the Court can see any characteristic in that shoeprint impression?

THE COURT: I don't know how I would, just looking at the photographs.

MR. SEARS: And I agree. This witness has said, I see some "V's" and I see some "V's" over here. The State wants that to amount to sufficient foundation to say that 2522 is a shoeprint in Track 2. 2522 is impossible to read.

Remember, Your Honor, this all began because we find a motion for a *Willits* instruction, and you have read Judge Lindberg's rulings on *Willits* instructions. The poor quality of the photograph in 2522 is precisely the kind of evidence that Judge Lindberg had in his mind when he was talking about the likelihood that a *Willits* instruction would be given at the end of this case.

But to allow in the middle of this hearing this witness to say, I can see something in 2522, which I can't see, the Court can't see, and the jury is not

going to see, and to allow that to somehow arise to the level of sufficient foundation to say that 2522 is an impression in Track 2 is the problem in this case. That photograph can't ever, in my estimation, be through this lay witness, transmogrified into enough evidence to be foundation for that proposition. Because what they are trying to do now is show the handful of photographs that she did take that she says are part of Track 2. There has to be some observable characteristic that the Court and the jury can observe that would allow her, as a lay witness, to say that. Beyond that she is into some sort of esoteric shoeprint impression.

THE COURT: Mr. Sears, what is your case for observable characteristics as a requirement for tracking testimony?

MR. BUTNER: Thank you, Your Honor.

MR. SEARS: *Amaya Ruiz*, it is a tracking case.

THE COURT: I saw that.

Mr. Butner?

MR. BUTNER: What Mr. Sears is attempting to do is mix tracking with shoeprint identification impressions. That is not what we are asking this witness to do. We are asking this witness about tracking. She was tracking those shoeprints. She noticed these "V" characteristics present in the shoeprint she was tracking. She saw them in the other shoeprint she was tracking and following. And she followed

them around as depicted on the map with her GPS.

She is not testifying about identity of shoeprint impressions. We have expert witnesses that will testify about that. It is not appropriate that she be asked where is the "V" on this photograph and compare it with the "V's" on this photograph. That is comparison of shoeprint impressions.

Mr. Sears took it that further step and did that. That is not what I was going to do. She indicated that she was not testifying about what was depicted in the photograph, but what she actually saw with her own visible acuity when she was out there tracking, and she saw those "V's," and those were in the other track that she was following. That is completely different from shoeprint identification -- shoeprint impression identification, Judge.

And Judge Lindberg has already ruled that this kind of testimony is allowable. So here we are re-litigating this issue at this point in time in the middle of the trial.

MR. SEARS: Let me speak to the question of whether this is shoeprint comparison evidence or tracking evidence, and what the problem is.

We attached to our *Willits* motion a copy of the 25-page Department of Public Safety protocol for preserving impression evidence. What it says, and you can

read it at your leisure, Your Honor, what it says is that when you are documenting a track or trail, whether it is bicycle tracks or shoeprint trail, there is a method using evidence cards, long range photos and video to show the trail. That makes sense, if you think about it in common sense.

If you see a trail of footprints here, do you document that by taking a picture of one of them, or do you start taking directional photographs saying, I can see here in this photograph this trail. I will take a tape and measure it and say it is 37 feet long. It contains 19 shoeprint impressions, and they are 18 inches apart. That is what the D.P.S. protocol says.

What the State is doing is taking this witness and saying the way we are going to document this trail is not the recommended logical way, which is to actually show the trail, so that in a photograph or video, the trier of fact can ultimately see the trail as it plays out. They are taking her handful of photographs of these Track 2 photographs, 2520 being among them, and saying trust us, this is a photographs of something in this trail. It is just a photograph out in space, way-point whatever the number it was that she said it was.

What I am saying is in order for a foundation to be laid using that methodology, which is going

to provoke a *Willits* instruction at the end of the case, using that methodology there has to be in 2522 that a lay observer can look at and say, I see something in 2522 that is in 2520, so that I can be assured that 2522 is from the same track made by the same shoe.

The police in this case chose to ignore the standardized and preferred way to do this, but they should not be allowed in trial, Your Honor, to do what they are doing here. To say that 2522 is a photograph of anything recognizable, much less it is a photograph of the same shoe impression made by the same shoe that made 2520, which is clearer.

It is not our fault that it is poor quality. It is not our fault that the sun was up. It is not our fault that anything happened. This is the evidence in this trial. That is the proposition that they are asking the Court to endorse by admitting 2522. That is where they run short of foundation on this.

MR. BUTNER: We are not short of foundation in terms of tracking. That is the issue here. Those protocols are for shoeprint impression evidence to identify shoeprints as matching shoes. That is not what we are talking about here. We were talking about an expert tracker, and that tracker is testifying about what she saw with her own eyes when she was out there.

She documented where these prints were when she took her photographs. Some of them are of good quality, some of them are not. Nevertheless, she did that as a tracker, not a shoeprint impression expert. Big difference. Judge Lindberg has already ruled that this kind of tracking testimony, given its specific parameters, which we have scrupulously adhered to, is admissible in this case. Here we are going back and trying to re-litigate the whole issue that has already been ruled upon by this Court.

THE COURT: Mr. Sears, if there was one track down a wide wet beach for three miles, how many observable characteristics would you need?

MR. SEARS: You wouldn't necessarily, Your Honor, if you did it the way that the Department of Public Safety recommends, where you take forensic photographs of a representative sample that actually shows, unlike 2522, that actually showed detail so that you can say these are taken, this is Item No. 19, 20, 21, 22, and then you have locational shots showing the wet tracks in the sand, and you can take that in a number of ways. You can measure it in a number of ways.

This is what Judge Lindberg said on April 13, Your Honor, talking about tracking. Line 21. This is page -- I don't have the page. I will give the page when I am done.

Judge Lindberg said, "I think that he's had sufficient training to be able to do that. I don't think that he is a shoeprint expert. I don't think that he can testify as to a pattern of what he saw or similarity to a La Sportiva shoe that was found. I think that is more on foundational grounds and lack of disclosure."

"With regard to his qualifications for being a shoeprint identification expert, following tracks from Point 'A' to 'B' and describing in terms -- general or precise, depending on whether he did any measurements -- about the direction they went, when they changed and that sort of thing, to the extent he can do that, I think is admissible."

"If he had some degree of information as far as what his observations were about the pattern that was made by the shoes, that he made a note of at the time, that is fine. But if he is simply relying on photographs and saying that 'The photographs look to me, as a tracker, like the same pattern as are on the bottom of the La Sportiva shoe,' I don't think there is foundation for him to do that. I don't think that he is an expert to be capable of doing that, and I would preclude that testimony -- or even to say it is similar, because I think that is getting into an expertise that he doesn't have and admittedly" --

THE COURT: Mr. Sears, you are speeding up

again.

We kept mixing in identifying observable characteristics with the shoe, and you are now repeating that. That is a different question than what we are talking about now.

I don't think further argument is going to help me. I am going to read the protocol that is in the record. If you have an extra copy handy, I would take it just so I can get it all the sooner. I will go back and read the specific parts of the record. Again, we got into mixing these two very different issues in my view.

MR. BUTNER: Thank you, Judge. That is exactly our point, the State's point.

THE COURT: I need to read this. I thought this was a settled issue. It was not something I thought was a repeat.

MR. BUTNER: I will note an objection that this particular argument is an attempt, in essence, to argue a motion for reconsideration on the issue, when it was already ruled upon by the Court.

THE COURT: I would like to excuse the detective.

I do want to remind you that the rule of exclusion of witnesses has been invoked. You fully understand what that means?

THE WITNESS: Yes, sir.

THE COURT: You can't discuss the case or your testimony with any other witness until it is completely over, can't communicate with any other witness about the case in any fashion. It is a good idea not to talk to anybody about the case until it is completed. However, you can talk to the attorneys about the case.

You are excused.

The other thing that I requested, and I wanted to have a few minutes to do this, was to see if anybody anticipates other issues where I can really focus. You know, I have read the rulings in the case. I appreciate that there were -- there was a compilation of rulings so I could read them. But are there other issues of this type? Of course, we have been considering other things as well.

MR. BUTNER: We brought some to the Court's attention by way of a pleading. One specifically. I'd ask that the defense now apparently be required to do that at some point. I guess I would suggest by the end of the day on Monday any motions to reconsider that they are going to argue in this case. I am not aware of any others.

THE COURT: Right now, I think Mr. Sears is avowing they are not only asking me to reconsider, they think that perhaps the prior ruling was not that clear. So I will take it in that vein, and I will review the ruling and the

case cited to me, *Amaya Ruiz*, and the protocol.

MR. SEARS: Thank you, Your Honor.

THE COURT: Then, Mr. Sears, do you know of any other issues where you think there hasn't been sufficient clarity in the pretrial practice?

MR. SEARS: We have seen examples already of the problems we alerted the Court to regarding this witness starting to give identity-related answers. The Court has sustained my objections to those questions. That is something we brought up, and there is not much we can do, other than continue to object if we think the witness is being asked to testify beyond the scope of her knowledge.

THE COURT: Thank you.

We will recess, then, and I ask the lawyers to be available at 8:30 on Tuesday, if there is any legal issue to take up.

MR. BUTNER: Thanks, judge.

THE COURT: Thank you.

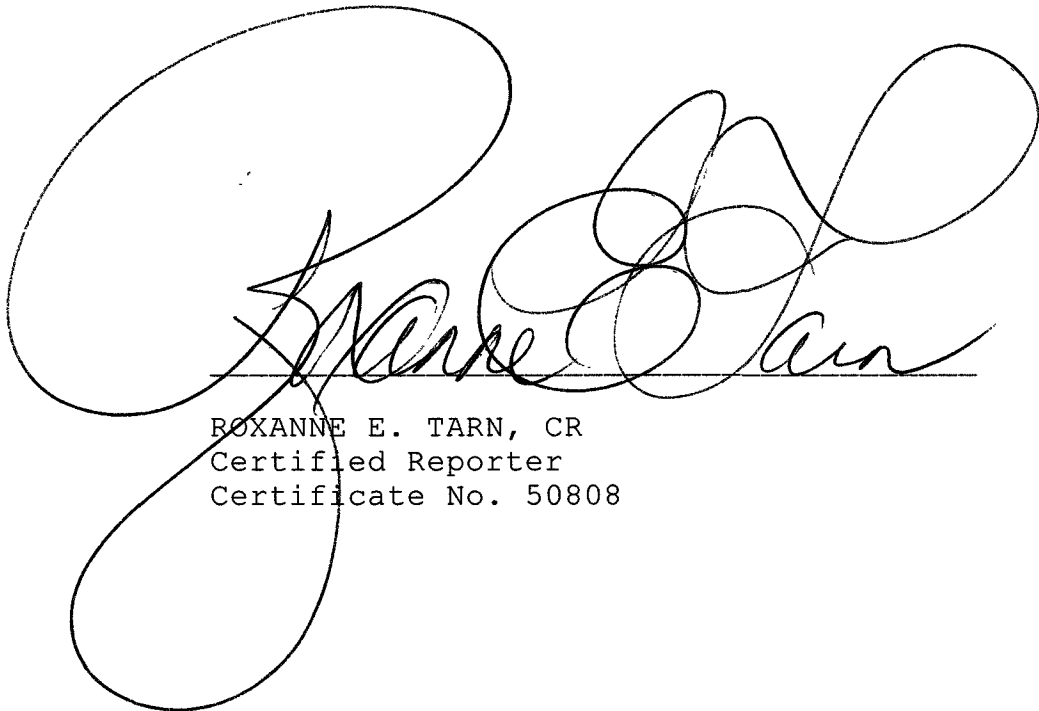
(Whereupon, these proceedings were concluded.)

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C E R T I F I C A T E

I, ROXANNE E. TARN, CR, a Certified Reporter in the State of Arizona, do hereby certify that the foregoing pages 1 - 40 constitute a full, true, and accurate transcript of the proceedings had in the foregoing matter, all done to the best of my skill and ability.

SIGNED and dated this 11th day of August, 2010.

A large, stylized handwritten signature in black ink, appearing to read 'Roxanne E. Tarn', is written over a horizontal line. The signature is highly cursive and loops around itself.

ROXANNE E. TARN, CR
Certified Reporter
Certificate No. 50808